COLGATE-PALMOLIVE (ASIA) LTD. v. SWEDISH EAST ASIA CO. LTD.

[O.C.J. (Ambrose J.) June 12, 1965]

[Singapore — Suit No. 92 of 1964]

Practice and Procedure — Parties — Application to substitute defendant — Addition of new party — When proceedings instituted — Limitation — American Carriage of Goods by Sea Act, s. 3(6) — R.S.C. 1934, O. XVI rr. 11 & 13 and O. LXIII r. 1.

This was a special case in which the question of law was raised whether the plaintiffs' claim against the defendants was barred by limitation for the reason that the defendants were substituted for the Malaya Indonesia Line, the original defendants, after the expiry of the limitation period of one year.

The action for damages for breach of contract in respect of the carriage of goods under a bill of lading was originally brought against the Malaya Indonesia Line within the limitation period of one year laid down by the Carriage of Goods by Sea Act of the United States. The Malaya Indonesia Line was the name under which business was done by three shipping companies including the Swedish East Asia Co., in association with one another. After conditional appearance had been entered for the original defendants, the plaintiffs applied for an order that Swedish East Asia Co., be substituted for the original defendants and that service of the amended writ and statement of claim be dispensed with. An order was made accordingly on April 3, 1964, that is, after the expiry of the limitation period.

Held: the substitution of the defendants in place of the original defendants was not the correction of a mere misnomer; it involved the addition of the defendants as a new party in replacement of the party that was removed. By O. XVI r. 11(4) the proceedings against the defendants were deemed to have begun only on the service of the writ on them; and as service of the writ on them was dispensed with, the proceedings as against them must be deemed to have been instituted when they were made a party, that is. after the claim had been barred by limitation. The action should therefore be dismissed with costs.

Cases referred to:—

(1) *Davies* v. *Elsby Brothers Ltd.* [1960] 3 All E.R. 672, at p. 674.

(2) *Whittam* v. *W. J. Daniel & Co. Ltd.* [1961] 3 All E.R. 76.

SPECIAL CASE

M. Karthigesu for the plaintiffs.

A. P. Godwin for the defendants.

Cur. Adv. Vult.

Ambrose J.: This is a special case stated by the parties pursuant to a consent order made on the 23rd October, 1964. The question of law raised by the special case for the opinion of the court is this: is the plaintiffs' claim against Swedish East Asia Co. Ltd., the present defendants, barred by limitation for the reason that the present defendants were substituted for Malaya Indonesia Line, the original defendants, after the expiry of the limitation period of one year?

The facts stated in the special case are as follows. By a bill of lading dated the 10th December, 1962, the present defendants acknowledged the shipment of 2900 bags of sodium tripolyphosphate by International Division Allied Chemical Corporation on the present defendants' vessel "Hermund" at Philadelphia; and they agreed to deliver the goods at Port Swettenham to the order of the shipper. Clause 2 of the bill of lading provides that if the goods are shipped from a port in the United States of America the bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States. The goods were in fact shipped from a port in the United States. Section 3(6) of the Act reads as follows:

> "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered".

The plaintiffs presented the bill of lading at Port Swettenham and took delivery thereunder within a few days of the 15th February, 1963. The limitation period expired accordingly within a few days of the 15th February, 1964.

The bill of lading was headed with the words "Malaya Indonesia Line". The plaintiffs commenced this action against Malaya Indonesia Line on the 14th January, 1964. The claim indorsed on the writ of summons is for damages for breach of contract or duty and/or for negligence in and about the carriage of 2900 bags of sodium tripolyphosphate under a bill of lading dated in December, 1962.

A conditional appearance was entered by Malaya Indonesia Line, the original defendants. By summons in chambers No. 118 of 1964, dated the 25th January, 1964, they applied for an order that the writ of summons be set aside for irregularity on the grounds that (a) the defendants were not an entity known to the law and (b) the notice delivered at the time of service of the writ was bad. In support of the application an affidavit by A. P. Godwin was filed on the 25th January, 1964. In reply an affidavit by M. Karthigesu was filed on the 29th January, 1964. The application was heard by Chua J. on the 21st February, 1964, and adjourned to the 3rd April, 1964.

By summons in chambers No. 411 of 1964, dated the 26th March, 1964, the plaintiffs applied for an order that Swedish East Asia Company Limited be substituted as defendants in place of Malaya Indonesia Line and that service of the amended writ and statement of claim be dispensed with, and for such further or other order as the court may deem necessary. In support of the application an affidavit by M. Karthigesu was filed on the 26th March, 1964. In reply an affidavit by C. L. Duff was filed on the 1st April, 1964. This application was heard by Chua J. on the 3rd April, 1964, when it was ordered that Swedish East Asia Co. Ltd. be substituted as

defendants in place of Malaya Indonesia Line, that the plaintiffs be at liberty to amend the writ and statement of claim accordingly, and that service of the amended writ and statement of claim be dispensed with.

It is not disputed that "Malaya Indonesia Line'" is a name under which business is done by three shipping companies in association with one another. They are the Swedish East Asia Co. Ltd., the Ocean Steam Ship Co. Ltd. and the China Mutual Steam Navigation Co. Ltd. It is not disputed that Mansfield & Co. Ltd. are the agents of Malaya Indonesia Line and that they were served with the writ in this action in their capacity as such agents.

The submission of counsel for the present defendants is as follows. The order of the 3rd April, 1964, was made under Order XVI, rule 11. By that order Swedish East Asia Co. Ltd. were substituted as defendants in place of Malaya Indonesia Line. The substitution involved the addition of Swedish East Asia Co. Ltd. as a new party in replacement of the party that was removed, namely, Malaya Indonesia Line: see *Davies* v. *Elsby Brothers, Ltd.*,[1] at page 674. Order XVI rule 11(4) provides:

"Every party, whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as is prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice".

Rule 11(4) makes it clear that the proceedings as against the present defendants shall be deemed to have begun only on the service of the writ on them. As the order of the 3rd April, 1964, dispensed with service on the present defendants, the proceedings against the present defendants commenced on the 3rd April, 1964. The present defendants were not a party to the suit before the 3rd April, 1964. This is not a case of misnomer. There is no resemblance between the names "Swedish East Asia Co. Ltd." and "Malaya Indonesia Line".

The submission of counsel for the plaintiffs is as follows. The court will allow the name of the defendant to be amended by substitution after the expiry of the period of limitation if the identity of the person intended to be sued was clear at the time of the service of the writ: *Whittam* v. *W. J. Daniel & Co. Ltd.*[2] When the writ in the present action was served on Mansfield & Co. Ltd., it must have been clear to them from their correspondence with the plaintiffs relating to the consignment of 2900 bags of sodium tripolyphosphate by the ship "Hermund" that the intended defendants were the owners of the "Hermund", who were the Swedish East Asia Co. Ltd.

The facts in the case cited by counsel for the plaintiffs were these. On the 10th September, 1957, the plaintiff, who was employed by W. J. Daniel & Co. Ltd., suffered an accident while at work and she was examined by a doctor on their behalf. On the 9th September, 1960, a writ was issued for her against "W. J. Daniels and Company (a firm)", claiming "damages for personal injuries sustained by the plaintiff in the course of her employment with the defendants" and caused, *inter alia*, "by the negligence of the defendants, their servants or agents". At that date no firm of that name was in existence. W. J. Daniels and Company, which was a partnership firm, ceased to exist in 1919, and was then carried on by one of the partners as sole proprietor until 1931 when it was taken over by W. J. Daniel & Co. Ltd. On the 12th October, 1960, after the expiration of the three-year period of limitation for bringing an action, the plaintiff was granted leave by Master Clayton to amend the writ by changing the name of the defendants from "W. J. Daniels and Company (a firm)" to "W. J. Daniel & Co. Ltd.". W. J. Daniel & Co. Ltd., applied for an order that the writ be set aside on the ground that the amendment allowed by Master Clayton on the 12th October, 1960, had the effect of substituting a new defendant. Master Lawrence dismissed this application on the 24th March, 1961. On the 26th July, 1961, Elwes J. reversed the order of Master Lawrence and ordered that the writ be set aside. The Court of Appeal allowed the plaintiff's appeal from the judgment of Elwes J. It was held (i) that the amendment was a correction of a mere misnomer since, in all the circumstances of the case, there could have been no doubt in the mind of the defendants when they got the writ that it was they whom the plaintiff intended to sue, and that she had simply got the name wrong; and (ii) that the mere omission of the word "Limited" did not mean that no person was sued and that, until that was corrected, there was no defendant to the proceedings.

It seems to me that the application of the plaintiffs by summons in chambers No. 411 of 1964 was not for leave to amend the writ by changing the name of the defendants from "Malaya Indonesia Line" to "Swedish East Asia Co. Ltd.". Such an application would have been made under Order LXIII, rule 1, which reads as follows:

"Non-compliance with any of the provisions of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the court or a judge so directs, but such proceedings may be set aside, either wholly or in part, as irregular or amended, or otherwise dealt with, in such manner and upon such terms as the court or a judge thinks fit".

The plaintiffs' application was made under Order XVI, rule 12, as appears from the notes of argument made by Chua J. This rule reads as follows:

"Any application to add or strike out or substitute

a plaintiff or defendant may be made to the court or a judge at any time before trial, by summons, or at the trial of the action in a summary manner".

This rule has to be read with Order XVI, rule 11(2), which provides as follows:

"The court or a judge may at any stage of the proceedings either upon or without the application of either party, and on such terms as appear to the court or a judge to be just, order that the name of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added".

Furthermore counsel for the plaintiffs obtained an order dispensing with service of the amended writ and statement of claim under Order XVI, rule 13, which reads as follows:

"Where a defendant is added or substituted, the writ of summons shall be amended accordingly, and the plaintiff shall, unless otherwise ordered by the court or a judge, file an amended copy of the writ as amended, and serve the new defendant with such amended writ or notice in lieu of service thereof in the same manner as original defendants are served, and the proceedings shall be continued as if the new defendant had originally been made a defendant".

I accept the submission of counsel for the defendants that the order of the 3rd April, 1964, was made under Order XVI, rule 11. In my judgment, the substitution of Swedish East Asia Co. Ltd. as defendants in place of Malaya Indonesia Line by that order was not the correction of a mere misnomer: it involved the addition of Swedish East Asia Co. Ltd. as a new party in replacement of the party that was removed. By Order XVI, rule 11(4) the proceedings as against Swedish East Asia Co. Ltd. shall be deemed to have begun only on the service of the writ on them. As service of the writ on them was dispensed with, it seems to me that for purposes of limitation the proceedings as against Swedish East Asia Co. Ltd. must be deemed to have been instituted when they were made a party, that is, on the 3rd April, 1964. As the period of limitation expired within a few days of the 15th February, 1964, I come to the conclusion that the plaintiffs' claim against the present defendants is barred by limitation. For the above reasons I dismiss this action with costs.

Action dismissed.

Solicitors: *Allen & Gledhill; Donaldson & Burkinshaw.*

KUO CHEN SUAN v. WILLIAM K. KWIK & ANOR.

[O.C.J. (Winslow J.) June 22, 1965]

[Singapore — Motion in Suit No. 828 of 1964]

Practice and Procedure — Commission payable to sheriff — Debtors Ordinance (Cap. 13), s. 17 — R.S.C. 1934 O. LX rr. 19 and 20 and Schedule B Item 117.

The plaintiff on an *ex parte* application obtained an order on May 27, 1964 under section 17 of the Debtors Ordinance that the sum of $100,000 received by the United Chinese Bank Ltd., be taken into custody by the sheriff as a pledge or security to cover the claim of the plaintiff until trial of the action and final judgment and satisfaction thereof. The sheriff demanded and received payment of the said sum. Subsequently the said bank who were not a party to the proceedings but who were affected by the order of May 27, 1964 applied on June 6, 1964 for an order to set aside the order of May 27, 1964 which was granted. The new order directed the sheriff to return the sum of $100,000 to the bank. It also ordered that the costs of the application should be taxed and paid by the plaintiff to the bank. The sheriff refunded the sum of $100,000 less a sum of $4,000 which he claimed to be the commission due to him under Item 117 of Schedule B to the Rules of the Supreme Court. This sum was allowed as a disbursement in the bill of costs submitted by the bank for taxation by the registrar but on appeal was disallowed by the judge who observed that the sheriff had not complied with the order of June 6, 1964 and the sheriff was not entitled to charge under Item 117 as it was not the money of the debtor. The question raised on the motion was whether the sheriff was entitled to deduct the sum of $4,000 as his fee.

Held: (1) the mandatory provisions of Order LXIV for deducting the sheriff's commission under Item 117 of Shedule B to the Rules come into play only when the money ordered to be attached by an order under section 17 of the Debtors Ordinance is clearly shown to be money belonging to a debtor. Section 17 empowers an order to be made *ex parte* and such an order does not resolve the question of ownership of the money in question for all time;

(2) the proper procedure in this case would have been that laid out in Order LX. If that procedure had been complied with the money in the hands of the bank could only have been seized by a garnishment notice, thereby giving the garnishee an opportunity to have the question of their liability to deliver up the money to the sheriff determined by a court or a judge. The sheriff then could have interpleaded under Order XLV;

(3) the commission should be returned by the sheriff to the bank without any order for attachment against him for contempt.

Case referred to:—

(1) *Bullen* v. *Ansley and Smith*, 170 E.R. 84.

MOTION IN SUIT.

K. S. Chung for the applicants (United Chinese Bank Ltd.).

Tan Boon Teik (Solicitor-General) for the sheriff.

Cur. Adv. Vult.

Winslow J.: On 27th May, 1964 Ambrose J., on an *ex parte* application by the plaintiff under section 17 of the Debtors Ordinance (Cap. 13), ordered that "a sum of $100,000 received by the United Chinese Bank Limited '(hereinafter referred to as the applicants)' of No. 2 Chulia Street, Singapore, for and on behalf of the 1st defendant and belonging to the 1st defendant from the Accountant-General, Singapore, be forthwith secured and taken into the custody of the sheriff as a pledge or security to answer the just claim of the plaintiff until the trial of the above action and judgment and satisfaction thereof", and also ordered "that the sheriff of